

COMMITTEE FOR PUBLIC COUNSEL SERVICES

PERFORMANCE GUIDELINES

GOVERNING THE REPRESENTATION OF INDIGENT JUVENILES IN CRIMINAL CASES *

These guidelines are intended for use by the Committee for Public Counsel Services in evaluating, supervising and training counsel assigned pursuant to G.L. c. 211D. Counsel assigned pursuant to G.L. c. 211D must comply with these guidelines and the Massachusetts Rules of Professional Conduct. In evaluating the performance or conduct of counsel, the Committee for Public Counsel Services will apply these guidelines and the Massachusetts Rules of Professional Conduct, as well as all CPCS policies and procedures included in this manual and other CPCS publications.

* These Guidelines have been written so that the practitioner need not reference the Guidelines Governing Representation of Indigents in Criminal Cases, which have essentially been incorporated where appropriate. On criminal matters (e.g., 14-16 year olds charged with murder), consideration of the Guidelines Governing Representation of Indigents in Criminal Cases is still appropriate.

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I. GENERAL PRINCIPLES OF REPRESENTATION

J 1.1 Role of Defense Counsel

Counsel's role in the criminal justice system is to insure that the interests and rights of the client are fully protected and advanced. Counsel's personal opinion of the client's guilt is totally irrelevant. The client's financial status is of no significance. Indigent clients are entitled to the same zealous representation as clients capable of paying an attorney. Counsel must know and adhere to all applicable ethical opinions and standards and comply with the rules of the court. Where appropriate, counsel may consider a legal challenge to inappropriate rules and/or opinions. If in doubt about ethical issues in a case, counsel should seek guidance from other experienced counsel or from the Board of Bar Overseers. Counsel shall interpret any good-faith ambiguities in the light most favorable to the client.

The role of counsel in delinquency and Youthful Offender (YO) cases is to be an advocate for the child. Counsel should insure that the interests and rights of the client are fully protected and advanced, irrespective of counsel's opinion of the client's culpability. This requires fully explaining to the juvenile the nature and purpose of the proceedings, using language that is appropriate to your client's age and mental capabilities, and the general consequences of the proceedings, seeking all possible aid from the juvenile on decisions regarding court proceedings. Counsel should also fully explain to the juvenile all court proceedings, as well as all his/her rights and defenses, using language that is appropriate to the client's age and mental capabilities. Upon appointment, counsel should first seek to meet separately with the juvenile out of the presence of the parent.* Counsel should not discuss any attorney-client privileged communications with the parent, or any other person, without the express permission of the juvenile. Counsel should advise the juvenile of the above at the onset of the attorney-client relationship. Counsel should fully inform both the juvenile and the juvenile's parents about counsel's role, especially clarifying the lawyer's obligation regarding confidential communications, using language that is appropriate to the client's age and mental capabilities. The lawyer should counsel the juvenile, present the juvenile with comprehensible choices, help the juvenile reach his own decisions and advocate the juvenile's viewpoint and wishes (as determined by the juvenile) to the Court. Counsel should refrain from waiving substantial rights or substituting his own view, or the parents' wishes, for the position of the juvenile.

* The use of the word parent hereafter refers to parent, guardian, custodial adult or person assuming legal responsibility for the child.

J 1.2 Education, Training and Experience of Defense Counsel

To provide competent representation, counsel must be familiar with Massachusetts criminal law and procedure, including changes and developments in the law. It is counsel's obligation to remain current with changes in the statutory and decisional law. Counsel should participate in skills training and education programs in order to maintain and enhance skills. Prior to undertaking the defense of one accused of a crime, counsel should have sufficient experience to provide competent representation for the case. Counsel should accept the more serious and complex delinquency or youthful offender cases only after having had experience and/or training in less complex criminal/delinquency matters. Where appropriate, counsel should consult with more experienced attorneys to acquire knowledge and familiarity with all facets of criminal representation, including information about practices of judges, prosecutors, probation officers, and other court personnel.

To provide competent representation in delinquency and YO matters, counsel must be familiar with G.L. c. 119, particularly §§ 53-84 and G.L. c. 120 as well as relevant case law. Counsel should also be cognizant of the roles of the Departments of Youth Services (DYS), Social Services (DSS), Mental Retardation (DMR), and Mental Health (DMH). Counsel should be aware of the various service delivery

systems and placement processes. Counsel should have a working knowledge of the law regarding: DYS classification procedures, Children in Need of Services (CHINS), Care and Protection, school suspension and expulsion, special education, and DSS Fair Hearings. Counsel should be aware that each of these other areas of law and social service systems has a potential overlap with the delinquency/youthful offender proceedings.

J 1.3 General Duties of Defense Counsel

The role of counsel is to insure that the juvenile is afforded due process. Counsel should assert all rights and raise all issues in the context of the case where strategically appropriate. This includes the filing of motions, with supporting affidavit and memoranda and handling the delinquency or youthful offender proceedings generally in accordance with the standards for performance in criminal proceedings.

- a) Counsel's primary and most fundamental responsibility is to promote and protect the interests of the client. This includes honoring the attorney/client privilege, respecting the client at all times, and keeping the client informed of the progress of the case. If personal reactions make it impossible for counsel to fulfill the duty of zealous representation, he or she has a duty to refrain from representing the client.
- b) Counsel must arrange for prompt and timely consultation with the client, in person, in an appropriate and private setting. When counsel is assigned to represent a new client and the client is held in custody (e.g., detention center or other place of commitment for alcohol/drug or mental health evaluation), counsel should immediately write DYS a letter informing the agency that the client is represented by counsel, and that under no circumstances may anyone from the police, prosecutor, or Commonwealth speak with the client without counsel. In all cases where the client is held in custody, counsel should visit the client within three business days of receiving the assignment. In those instances when it will not be possible for counsel to see a new in-custody client within three business days of assignment, the attorney must: (1) write to the client within three business days of receiving the assignment and advise the client that s/he has been assigned to the representation and also inform the client of the date upon which counsel will visit the client; (2) if appropriate, provide the client with a copy of discovery received in the case; and (3) counsel should call the DYS facility where his/her client is detained and speak to the client and inform the client of when he/she can expect a visit. Counsel should contact the juvenile within 24 hours of receiving an appointment. Counsel should also assure him/herself that the client is competent to participate in his/her representation, understands the charges, and has some basic comprehension of criminal procedure. The client must be given adequate time to fully apprise counsel of the evidence and defenses in his/her case. Counsel must also arrange for prompt and thorough consultation with the parent or guardian, said consultation to be within parameters established by the client.
- c) Counsel has an obligation to make available sufficient time, resources, knowledge and experience to afford competent representation of a client in a particular matter before agreeing to act as counsel or accepting an appointment. Counsel must maintain an appropriate, professional office in which to consult with clients and witnesses and must maintain a system for receiving regular collect telephone calls from incarcerated clients. Counsel must provide incarcerated clients with directions on how to contact the office via collect telephone calls (e.g., what days and/or hours calls will be accepted). It is recommended that counsel anticipate that juvenile clients will require more contact between court dates than the average adult client.
- d) Counsel has an obligation to keep and maintain a thorough, organized, and current file on each client. As part of this file, counsel should maintain a "running sheet" or log which records information such as information obtained during all interviews of the client; interviews of witnesses, interviews of

family members, friends and employers; client's background and history; court dates and events; contact with investigators and results of investigations; conversations with the prosecutor regarding discovery, dispositional issues including plea offers, trial issues; conversations with the probation officer, lobby conferences or conversations with a judge; conversations with police officers or Commonwealth investigators; telephone conversations regarding the case; conversations, consultation and evaluation by experts, etc.

- e) Counsel must be alert to all potential and actual conflicts of interest that would impair the ability to represent a client. Such conflicts should be avoided where possible or addressed in a timely manner.
- f) The attorney shall explain to the client those decisions that ultimately must be made by the client and the advantages and disadvantages inherent in these choices. These decisions are whether to plead delinquent or not delinquent and to change such plea; whether to be tried by a jury or a court; whether to testify at trial; whether to appeal; and whether to waive his/her right to a speedy trial.
- g) The attorney should explain that final decisions concerning trial strategy, after full consultation with the client, and after investigation of the applicable facts and law, are ultimately to be made by the attorney. The client should be made aware that the attorney is primarily responsible for deciding what motions to file, which witnesses to call, what questions to ask, and what other evidence to present. Implicit in the exercise of the attorney's decision-making role in this regard is consideration of the client's input and full disclosure by the attorney to the client of the factors considered by the attorney in making the decisions. Counsel should inform the client of an attorney's ethical obligation, informed by professional judgment, not to present frivolous matters.
- h) Counsel's obligation to the client continues on all matters until and unless another attorney is assigned and/or files an appearance. Counsel should fully cooperate with successor counsel and must, upon request, promptly provide successor counsel with the client's entire case file, including work product.
- i) Counsel should be aware of and protect the client's right to a speedy trial, unless strategic considerations warrant otherwise.
- j) Unless the prejudice outweighs the benefits, counsel should seek any necessary recess or continuance of any proceeding for which counsel is inadequately prepared. Counsel should follow appropriate court practices to minimize inconvenience to any individuals.
- k) Consistent with the obligations and constraints of both court and ethical rules, counsel should make reasonable efforts to seek the most advantageous forum for the client's case, e.g., motions to change venue, etc.
- l) Where counsel is unable to communicate with the client or his or her guardian because of language differences, the attorney shall take whatever steps are necessary to insure that he/she is able to communicate with the client and that the client is able to communicate his/her understanding of the proceedings. Such steps would include obtaining funds for an interpreter to assist with pre-trial preparation, interviews, and investigation, as well as in-court proceedings.
- m) Where counsel is unable to communicate with the client because of mental disability, the attorney shall obtain expert assistance for an evaluation of the client to determine what steps, if any, can be taken to improve communication and understanding to acceptable levels. If no steps can be taken, counsel should address the court on the issue of the client's competence.

- n) Counsel should be prompt for all court appearances and appointments and, if a delay is unavoidable, should take necessary steps to inform the client and the court, and to minimize inconvenience to others.
- o) Counsel may request the appointment of a guardian ad litem, or may elect not to oppose such an appointment, only when very unusual circumstances warrant such an appointment. Every effort should be made to limit the role of the guardian ad litem to the minimum required for him/her to accomplish the purpose for which the appointment was made. In most cases both the guardian and the client should be instructed not to discuss the facts of the case as this discussion may not be privileged.

II. PRELIMINARY PROCEEDINGS & PREPARATION

J 2.1 Arraignment

- a) Counsel should be familiar with the bail laws, including the legal standards the court may consider in setting the conditions of release (G.L. c. 276, § 58) as well as the procedure for appeal of the court's decision. If the nature of the offense and/or the client's record indicate that the client may not be released on personal recognizance, counsel should insist on an opportunity to interview the client and conduct an appropriate investigation before the court considers setting bail. Before interviewing the client, counsel should examine the complaint and/or indictment and inform the client of the exact charges, should review the police report(s), and should review the client's probation [CORI] record, paying particular attention to any alleged convictions, incarcerations, defaults, pending cases, open probation matters and open restraining orders, and ascertain what other relevant information may be in the possession of the probation department or prosecution.
- b) Counsel should familiarize him/herself with the particular arraignment practices of each session in which s/he appears. For example some courts routinely obtain school attendance records at arraignment.
- c) In addition to meeting with the juvenile client, counsel should determine whether a parent is at the court in connection with the juvenile proceeding. Counsel should ascertain the adult's ability and willingness to assume custody of the juvenile or to post bail for the juvenile. Counsel should be aware that the court will usually release a juvenile to the care and custody of a parent. Counsel should also be aware that most juvenile courts will not release a juvenile without an apparently responsible adult in court willing to take custody. Every effort should be made to locate and contact such a responsible adult if none are present.
- d) Counsel should be familiar with the law regarding pre-trial detention on the grounds of dangerousness (G.L., c. 276, § 58A). If the Commonwealth moves for a hearing to determine whether or not the client should be detained, counsel should determine whether or not there is a legal basis for such a motion. Counsel should seek to minimize the amount of time the client is held prior to a detention hearing. In preparing for a detention hearing, counsel should consider the wisdom and consequences of summoning witnesses including the complainant.
- e) In addition, counsel should be familiar with the law regarding bail revocation, pursuant to G.L. c. 276, s. 58 and be prepared to raise constitutional issues. If the Commonwealth moves to revoke the client's bail on another case due to the new offense, counsel should determine whether or not there is a legal basis for such a motion. Counsel should be prepared to argue that the client facing bail revocation is entitled to the same process and the Commonwealth has the same burden of proof by clear and convincing evidence as a client facing s. 58A preventive detention. Counsel should insist upon a hearing, notice and time to prepare and subpoena witnesses.

- f) Counsel should strongly advise the client not to waive any significant rights at this proceeding, including whether to proceed with a jury trial or to have the case heard in the bench trial division.
 - 1. A guilty plea or an admission to sufficient facts at this stage is inadvisable due to the inadequate time to investigate the case. In rare circumstances, and if the attorney has significant experience and after adequate consultation with the client and investigation, it may be appropriate to take advantage of a disposition that may not be available later, especially one which does not involve a criminal record such as diversion, drug evaluation under G.L. c. 111(e), mediation, or a continuance without a finding. However, counsel should be aware of potential immigration consequences of a continuance without a finding, which may be considered a conviction for immigration purposes.
 - 2. Where strategically appropriate and especially if the client may be held on bail, counsel should request a trial or pretrial hearing as soon as practicable within fifteen (15) days (G.L. c. 119, § 68). Counsel must discuss with the client his/her right to return to court within fifteen (15) days and may waive this right only after discussion with the client of the pros and cons of such a waiver.
 - 3. Counsel should be aware of G.L. c. 119, § 68A regarding pretrial evaluation of a juvenile. Counsel should consider and protect the juvenile's rights relative to confidentiality, evidentiary, and tactical issues.
- g) Counsel should be thoroughly familiar with the law and court practices regarding competence to stand trial and criminal responsibility (G.L. c. 123, § 15; Mass. R. Crim. P. 14). Counsel should also be aware of, and protect, the client's statutory and constitutional rights with respect to such competency examinations. Counsel should be aware that children present special competency and criminal responsibility issues and should be alert for these issues. Counsel who is appointed to represent the client for bail only should give special consideration to these issues and should rarely, if ever, agree to such a commitment at the time of the client's arraignment.
- h) Counsel should insure that every client (and parent) is provided with a card noting the next court date, an office appointment date, any other important dates, as well as complete information on how to contact the attorney.
- i) The assigned defense trial counsel should represent the client at any competency hearing arising in the case.

J 2.2 Initial Interview and Preparation for Bail Hearing

- a) The scope and focus of the initial interview will vary according to the circumstances under which it occurs. A meeting or conversation conducted in a courthouse hallway or lockup is not a substitute for a thorough interview conducted in private.
- b) If identification may be an issue, counsel should be aware of, and consider preventing, any identification opportunities for prosecution witnesses that may arise at arraignment.
- c) If the client may be detained, the focus of the initial interview and investigation will be to obtain information relevant to the determination of bail and/or pretrial conditions of release. Such information should generally include:

1. client's residence and length of time at that residence;
 2. family (names, addresses and phone numbers);
 3. health (mental and physical) and employment background;
 4. explanation of any court defaults and any other information on the record;
 5. probation/DYS/CHINS status;
 6. possible sources of bail money;
 7. the general circumstances of the alleged offense and/or arrest, including, where relevant, any identification procedures that occurred;
 8. client's legal custody (parent, family, state agency) and physical custody (person responsible to supervise client) - names, addresses and phone numbers;
 9. client's school placement, (G.L. c. 71B); status, attendance, special ed. designation;
 10. possible adults willing to assume responsibility for the juvenile and/or post bail;
 11. the names and addresses of any agencies involved with the child and/or parent, e.g. DSS worker, DMH worker, community health center, etc.;
 12. the client's reputation in the community; and
 13. whether the client's family, friends, or employer are present in the courtroom.
- d) Such information should be verified whenever possible.
- e) Whether or not the client is detained, counsel should describe the court procedures and counsel's obligation regarding the attorney/client privilege. Counsel should explain the client's rights under the Fifth Amendment to the United States Constitution and Article XII of the Massachusetts Declaration of Rights and should specifically advise the client not to discuss the case or any of the facts surrounding it with anyone, including family members, friends, and fellow prisoners, unless counsel advises otherwise. Counsel should inform the client of the right to request that his/her attorney be present at any interview or questioning.
- f) Counsel should obtain signed releases by the client and parent for mental health records, school records, DSS records, DYS records, employment records, etc. Counsel should advise the client of the potential use of this information and the privileges that attach to this information

J 2.3 Bail or Detention Hearing

- a) Counsel has an obligation to vigorously attempt to secure the pretrial release of the client under conditions most desirable to the client. While favorable release conditions are the principal goal of the hearing, counsel should also be alert to all opportunities for obtaining discovery.
- b) Counsel's argument to the court should include the client's ties to the community and other factors that support a conclusion that the client, if released, will return for future court appearances. The

client should not, except in the judgment of very experienced counsel, under the most extraordinary circumstances, testify at a bail hearing. Although comments on the strength and quality of the Commonwealth's case are necessary and appropriate and reference may be made to the general nature of the anticipated defense, the specific elements of the client's defense should not be revealed at the arraignment or bail hearing. Counsel should, where appropriate and helpful, identify people who are in the courtroom on behalf of the client.

- c) Counsel should be prepared to address the special issues of dangerousness that are the focus of hearings under G.L. c. 276, § 58A, and, where appropriate and possible, be ready to present proffers that address those issues. Counsel should be prepared to address the issue of bail revocation pursuant to G.L. c. 276, § 58. Counsel should also be prepared to address the issue of detention related to a preliminary probation violation hearing.
- d) Counsel should consider and advocate for reasonable conditions of release or recognizance such as pre-trial probation, electronic monitoring, stay away orders, curfews, mental health treatment with appropriate protective orders, substance abuse treatment with appropriate protective orders, surrender of passports or licenses (motor vehicle or firearms), etc., in addition to monetary sureties. Counsel must discuss these conditions of release with the client prior to suggesting them at the hearing.
- e) G.L. c. 276, § 58 controls both juvenile and adult proceedings. Counsel should be aware that the statute provides for a presumption of personal recognizance. The focus of the bail hearing should be whether the juvenile will appear for further court proceedings. Counsel should oppose any bail order which is in the nature of preventive detention, such as "DSS or DYS only cash bail," or any bail order where the purpose of detention is ostensibly for treatment. Counsel should be careful in considering whether a parent only cash bail is tantamount to preventive detention.
- f) Even if release is not affected, counsel should advocate for the least amount of bail. The amount of bail and type of charge may determine the type of facility where the juvenile will be held, i.e., lower bail may result in a less restrictive setting within DYS.
- g) Bail appeals must be considered in every case where bail is imposed and the client is detained.
- h) Where the client is not able to obtain release under the conditions set by the court, counsel should advise the client of his/her right to appeal under G.L. c. 276, §§ 58 and 58A and the advantages and disadvantages of doing so. Where appropriate, counsel should facilitate the bail appeal procedure, including pressing for the right to be heard on the same day and be prepared to represent the client at the hearing. It is crucial that counsel learn the bail appeal procedures applicable to each jurisdiction in which they practice. If counsel cannot represent the client at the bail appeal, s/he should assure that the counsel who does has all information necessary before proceeding with the bail appeal.
- i) Where the client is incarcerated and unable to obtain pretrial release, counsel should alert the court, the sheriff, and DYS to any special needs of the client, e.g. medical problems, and request the court to order appropriate measures. Counsel should follow-up with the client and the facility to ensure that the client's needs are being addressed.
- j) Counsel should be aware that juveniles can be released on bail or personal recognizance, and with his/her consent placed on pre-trial probation pursuant to G.L. c. 276, § 87. Counsel should protect the client's rights at this important stage. Counsel should make sure that if conditions are imposed they should be reasonable. Counsel should fully explain the conditions to the client in language that is appropriate to the client's age and mental capabilities, and the client should be able to communicate

his/her understanding of these conditions. If there is a violation of the conditions, counsel should be aware of the procedures for revoking bail. Jake J. v. Commonwealth, 433 Mass. 70 (2000).

J 2.4 Preliminary Discovery Issues/Prosecution Requests for Non-Testimonial Evidence

- a) Counsel should carefully examine and seek copies of all pertinent and available court papers and police reports. If the police report is redacted, counsel should move for the names and addresses of all witnesses. Counsel should seek preservation and/or discovery of evidence (such as visible injuries) likely to become unavailable unless special measures are taken. Where appropriate, counsel should request court orders for preservation of evidence, e.g. "911" or "turret" tape recordings, notes of investigating officers, and biological/forensic evidence. Counsel should be aware of the potential for loss or destruction of evidence by forensic examination or testing and take appropriate steps to prevent or minimize it. Counsel should know and protect the client's rights governing the prosecution's efforts to require a defendant to submit to procedures for gathering non-testimonial evidence, such as lineups or other identification procedures, handwriting exemplars, physical specimens, etc.
- b) Counsel should be aware that G.L. c. 119, § 55A requires that discovery be in writing, and counsel should request that this requirement be honored.

J 2.5 Special Concerns

- a) Particularly if the client is detained, counsel should consider a prompt motion to dismiss any charge or aggravating element that is not supported by probable cause.
- b) Where appropriate, counsel should consider the advantages and disadvantages of seeking cross-complaints.
- c) Counsel should be aware of the special privacy considerations given a juvenile; i.e., G.L. c. 119, § 65 requires that all delinquency hearings be closed to the general public.
- d) Counsel should be aware that delinquency papers are not public documents; however they can be released with the consent of the court. After two findings of delinquency on felony charges, the probation officer may make public the juvenile's name when the juvenile is charged with a third felony. (See G.L. c. 119, § 60A). Youthful Offender cases are not open to the public until the juvenile has actually been indicted.
- e) Counsel should consider obtaining funds for an interpreter, investigator, expert (e.g., psychologist) at arraignment if the client does not speak English, immediate investigation of the allegations is necessary, or immediate psychological/psychiatric evaluation of the client is warranted. Otherwise, these motions may be filed at the pre-trial hearing date.
- f) Counsel should take advantage, where appropriate, of opportunities to interview witnesses who may be present in court. Counsel must avoid becoming a witness in his/her own case. Therefore, interviews of prosecution witnesses should be "witnessed" by another person (e.g. another defense attorney) to avoid later problems with proving an impeaching statement at trial.

III. TRANSFER HEARING PURSUANT TO G.L. c. 119, § 72A

Transfer generally only arises in the context of G.L. c. 119, § 72A. This statute controls the prosecution of cases in which the alleged act took place prior to the defendant's 17th birthday, but he/she was not "apprehended" until after his/her 18th birthday. The decision whether to prosecute the defendant as an adult or to discharge him/her has dramatic consequences. Counsel should prepare accordingly.

J 3.1 Initiation of Transfer Hearing Request

Counsel should be prepared to argue strenuously to the court, as well as to the assistant district attorney, that the case should not be heard as a transfer hearing under G.L. c.119, §72A, because the Commonwealth made an inadequate effort to bring the defendant into court before his/her 18th birthday or because such a proceeding would not be in the interests of justice.

J 3.2 Transfer Hearing - Part A

- a) Counsel should be aware that transfer under G.L. c. 119, § 72A, requires the judge to make a finding of probable cause that the defendant committed the charged offense. Counsel should always seek a complete and recorded probable cause hearing except in the most extraordinary circumstances. Counsel should order a copy of the tape or transcript. In many courts it will be appropriate to request a stenographer to assure a record of the hearing, given the poor quality of the recording systems throughout the state. Counsel should also argue that there is no statutory provision for substituting Grand Jury minutes for a hearing and that even if the Grand Jury minutes are admitted into evidence the defendant is still entitled to cross-examine the Commonwealth's witnesses and call any other relevant witnesses.
- b) Counsel should refer to Section IV, Probable Cause Hearings of the [*Performance Guidelines Governing Representation of Indigents in Criminal Cases*](#), for other issues relating to preparation for the hearing.

J 3.3 Transfer Hearing-Part B

- a) Counsel should be aware of the statutory findings (protection and interests of the public) that G.L. c. 119, § 72A requires the judge to make. Counsel should be prepared to argue that the judge should consider, but is not limited to, the following factors: (i) the seriousness of the alleged offense; (ii) the child's family, school and social history, including his court and juvenile delinquency record, if any; (iii) adequate protection of the public; (iv) the nature of any past treatment efforts for the child; and (v) the likelihood of rehabilitation of the child. Commonwealth v. A Juvenile, 16 Mass. App. Ct. 251 (1983).
- b) Counsel must have up-to-date knowledge of the statutory and case law governing these findings.
- c) Counsel shall, at a minimum, review, and unless inappropriate, obtain copies of the client's psychosocial evaluations, social services records, psychological reports and evaluations, placement or program evaluations and reports, school records, and medical history. Protective orders concerning access to and prosecutorial use of such information should be requested. Counsel should consider moving under G.L. c. 261, §§ 27A-G, *ex parte*, if possible, for independent evaluations, reports and histories. Counsel shall also facilitate and make substantial efforts to secure services through school, community agencies, DSS, DYS, or DMH, as appropriate.

- d) Counsel should be prepared to present testimony by people who can provide helpful insight into the client's character, including: teachers, athletic personnel, counselors, DYS counselors, psychologists, community members, probation officers, religious affiliates, employers, or other persons with a positive personal and/or professional view of the defendant.
- e) Counsel should be certain that all Part B proceedings are recorded. Counsel's file should contain notes of names, addresses and essential testimony at the Part B proceeding. Due to the inadequacies of recording systems and the importance of the hearing, counsel should consider a motion for funds to obtain a court reporter. See [*Performance Guidelines Governing Representation of Indigents in Criminal Cases*](#), § 6.1, ¶ e(3).
- f) Counsel shall order the tape or transcript of Part A & B proceedings.
- g) Counsel should request written findings of fact by the Court, should the case be transferred to adult court.

J 3.4 Post Transfer Responsibilities

- a) After dismissal of the juvenile complaints, the youth is arraigned on adult charges; counsel should be prepared to argue bail.
- b) Counsel shall carefully review the judge's findings to determine if the order of transfer is deficient. Where findings are deficient, counsel should file a Motion to Dismiss and/or Remand to Juvenile Court under G.L. c. 277, § 47A.
- c) Counsel's motion, affidavit and memorandum should set forth relevant testimony or materials, or refer to the lack thereof, presented at the hearing. Because these motions are not de novo proceedings, relevant portions of the hearing should be appended. If new counsel is representing the youth he/she should confer with prior counsel who represented the client in the juvenile court and review the proceedings in detail. Counsel should ascertain whether there have been any significant personal or family changes arising since the conclusion of the juvenile court proceedings. Counsel should secure any further evaluations or other materials that are in the youth's best interest. New counsel should, as appropriate, confer with any representatives of state agencies or others involved with the youth.
- d) If the court denies the Motion to Dismiss and/or Remand, counsel should consider an appeal to the Supreme Judicial Court pursuant to G.L. c. 211, § 3 and relevant case law.

IV. YOUTHFUL OFFENDER PROSECUTIONS

J 4.1 Appointment of Counsel

Counsel should be aware of the criteria established by G.L. c. 119, §§ 52, 54, and 58, regarding which cases are eligible for Youthful Offender prosecution. Counsel should also be aware of all procedural differences between delinquency and youthful offender prosecutions. Only attorneys who have been certified for YO cases should accept a case in which YO prosecution is possible.

J 4.2 Limiting Consequences of Indictment

- a) Counsel should at the earliest opportunity make every effort to advise the client of the ramifications of a YO prosecution. Counsel should assess the strength of the Commonwealth's case as quickly as possible in order to assist the client in pre-indictment plea bargaining.
- b) Counsel should be prepared to develop dispositional material quickly, if it might be of assistance in persuading the Commonwealth not to pursue a Youthful Offender indictment. Counsel should be aware of the indictment policies of the County in which the case is pending and be prepared to initiate pre-indictment plea negotiations at the appropriate time in the appropriate cases.
- c) In the event of a Youthful Offender indictment, counsel should prepare the case for trial in the same manner that a case is prepared for trial in the Superior Court. Pretrial preparation includes discovery motions, investigation, substantive motions, client preparation, etc. See [Section V. Pretrial Preparation](#), below.

J 4.3 Youthful Offender Sentencing

- a) Simultaneous with the trial preparation, counsel should be preparing for a sentencing hearing. This process needs to begin prior to adjudication, because it is time-consuming to obtain records, background information, psychological evaluations, and the like. Counsel should remain on the lookout for information which might persuade the Commonwealth to agree to a dismissal or *nolle pros* of the indictment and reinstatement of the delinquency complaint.
- b) Counsel should be aware that G.L. c. 119, § 58, states that upon a defendant being adjudicated to be a Youthful Offender, the Court "shall conduct a sentencing recommendation hearing." This hearing is to "determine the sentence by which the present and long-term public safety would be best protected." Counsel should be ready to address the factors outlined in the statute as well as any other factors (helpful or otherwise) which the Court might or ought to consider. At all times counsel should keep in mind that tactical decisions regarding the sentencing process should be based on the client's stated goals.
- c) Counsel should take all necessary steps to prepare for the sentencing hearing. This may include: obtaining funds for an independent psychological evaluation, obtaining funds for a psycho-social evaluation by a LICSW or other qualified professional, sharing information with the probation office responsible for preparing a report for the Court, assisting with a court-ordered Court Clinic Evaluation, etc. This may also involve asking DYS to make a pre-adjudication classification decision.
- d) Counsel should be prepared to argue that the youthful offender provisions of G.L. c. 119 permit DYS commitments to be suspended, even for firearm offenses. Counsel should be aware that the mandatory commitment language in G.L. c. 119, § 58, for gun offenses is for delinquency adjudications; the statute is silent as to whether mandatory commitment also applies to youthful offender adjudications.
- e) Counsel should recognize that a juvenile disposition is almost, but not always, better than an adult disposition. Counsel should approach sentencing creatively and should advise clients about both short and long term consequences of sentencing, particularly when dealing with adult suspended sentences.
- f) Counsel should be aware that the court is required (G.L. c. 119, § 58) to make written findings stating its reasons for the sentence imposed. Counsel is well-advised to consider filing proposed findings.

- g) Counsel should be prepared to withdraw a defendant capped plea or seek a stay of sentence and/or file an appeal of the sentence if the findings are inadequate.

J 4.4 Youthful Offender Indictment

- a) Counsel should be aware of the three factors G.L. c. 119, § 54, requires for a youthful offender indictment.
- b) Counsel should thoroughly review the grand jury minutes to evaluate whether the prosecution presented sufficient evidence to satisfy the requirements of § 54.
- c) Counsel should be aware of the current case law regarding motions to dismiss youthful offender indictments. Commonwealth v. Quincy Q., 434 Mass. 859 (2001).
- d) Counsel should also be aware that the three factors required in section 54 must be proved beyond a reasonable doubt at trial.

V. PRETRIAL PREPARATION

J 5.1 Investigation

Counsel should promptly investigate the circumstances of the case and explore all avenues leading to facts relevant both to the merits and to the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities as well as from witnesses identified by the client or by others. Counsel should consider obtaining funds for an investigator to interview witnesses, while being aware of his/her reciprocal discovery obligations. Counsel should go to the scene of the alleged crime in a timely manner, prior to the pre-trial hearing when necessary, or prior to an evidentiary hearing or trial. Counsel should consider obtaining fair and accurate photographs, fair and accurate maps of the area and, where relevant, measurements.

J 5.2 Probation Surrender Hearings

- a) Counsel appointed to represent a client charged with violation of his/her probation should prepare in the same way and with as much care as for a trial. Counsel must request time to: (i) conduct an in-person interview with the probationer; (ii) discover and review the Probation Department file; (iii) discover and review records of the probationer's participation in mandated programs; (iv) obtain expert assistance to test the validity of scientific evidence underlying the surrender (e.g., urinalysis results); and (v) identify, locate, and interview exculpatory or mitigating witnesses, etc. Counsel should consider selecting a date for the final hearing that allows the client sufficient time to work towards compliance with the conditions of probation.
- b) Counsel shall be familiar with the District Court Rules for Probation Violation Proceedings. See G.L. c. 218, § 59.
- c) Per District Court Rules for Probation Violation Proceedings, most judges will not allow the violation of probation hearing to track a new offense. Therefore, counsel must prepare for the final hearing based upon the facts of the new offense and familiarize him/herself with the case law regarding admissibility and sufficiency of hearsay in these proceedings. If counsel does not represent the client on the new offense, counsel should contact the attorney who does represent the client on the new

offense to discuss the hearing, possible discovery issues, possible defenses and possible consequences of a finding of a violation of probation.

J 5.3 Pre-Trial Motions and Affidavits

Counsel should file any motions that are strategically and legally appropriate. The decision to file motions should be made only after appropriate investigation (including client interview, examination of court documents and other material obtainable through informal means and summons) and researching relevant law. Counsel must be familiar with the requirements of the Massachusetts Rules of Criminal Procedure, including time limits and affidavit requirements. If more time is needed, it should be requested. Before filing a pretrial motion and affidavit, counsel should be aware of any adverse potential effects, such as its impact on the defendant's speedy trial rights or the opportunity a motion may provide the Commonwealth to preview and strengthen a weak case. Counsel should also be aware of the adverse consequences that may attend the failure to file motions, such as "waiver" of rights or defenses. Affidavits should be drafted with care to protect the client's Fifth Amendment rights and to avoid disclosing trial strategy.

J 5.4 Pre-Trial Conference Reports

If a pretrial hearing is ordered, counsel should be cognizant of the requirements of Mass. R. Crim. P. 11. Counsel should carefully scrutinize and amend any pretrial conference forms to comport with fairness and case law and to protect the client's best interests. Counsel should amend pretrial conference report forms to accurately reflect counsel's reciprocal discovery obligations pursuant to Mass. R. Crim. P. 14 (a)(3) and relevant case law.

J 5.5 Discovery Motions

Among the discovery material counsel should consider seeking, through motions if necessary, are the following items that may be in the custody or under the control of law enforcement or other prosecution agents or agencies:

1. details of all identification procedures, including examination of any photographs shown and selected;
2. written and oral statements of defendant/co-defendant(s);
3. copies of statements by potential witnesses;
4. copies of all official reports, e.g., police, arson, hospital, results of any scientific test;
5. inspection of physical evidence;
6. list of potential witnesses and addresses;
7. names and addresses of any witnesses, including proposed police officer experts, expected to offer expert opinions and the substance of their anticipated testimony (including their curriculum vitae/resume, materials used or relied upon in reaching their opinion and the factual and scientific basis for their opinion);
8. probation records of all potential witnesses;
9. copies of Grand Jury minutes;

10. exculpatory evidence, identified as specifically as possible, and including promises, rewards, and inducements made to witnesses;
11. any other items that would be helpful in preparing and trying the case (e.g., audio or videotapes of interviews, booking, scenes, etc.);
12. notice of prior or subsequent bad act evidence; and
13. notice of excited utterance evidence.

J 5.6 Reciprocal Discovery

Counsel must be familiar with the rules and developing body of case law regarding reciprocal discovery. Counsel must be aware of, consider, and thoroughly research any potential obligations and time limits regarding reciprocal discovery (Mass. R. Crim. P. 14[a][3]).

J 5.7 Substantive Pretrial Motions

Among the motions that counsel should consider are:

1. nonsuggestive identification procedures (e.g., lineup or its equivalent, testimony with client out of view, etc.) where strategically indicated and desired by the client;
2. dismissal for unconstitutionality of the statute;
3. dismissal for insufficiency of the complaint or indictment;
4. dismissal for insufficiency of the evidence presented to the grand jury/magistrate resulting in indictment/complaint, including insufficiencies under Commonwealth v. Quincy Q., 434 Mass 859 (2001); or for impairment of the integrity of the grand jury;
5. request for speedy trial or dismissal for lack of speedy trial either for violation of Rule 36 or on constitutional grounds;
6. severance or joinder of defendants or charges;
7. suppression of evidence obtained in violation of federal and Massachusetts law, i.e., (i) illegally seized evidence, (ii) "un-Mirandized" or involuntary statements, (iii) statements made where an "interested adult" was not present or did not adequately advise the juvenile, (iv) identifications procured by impermissibly suggestive procedures. Counsel should take care to consider issues which may be unique to juvenile defendants such as the "interested adult rule" and school search scenarios;
8. funds for experts, investigators, interpreters, etc., under G.L. c. 261, §§ 27A -27D. Counsel should consider retaining experts as consultants to aid in trial preparation, not only as witnesses. Counsel should be aware of the procedures for appealing the denial of a motion for funds;
9. Counsel should pay particular attention to any competency issues and file motions for funds accordingly;

10. Counsel should also consider motion for funds for social workers and/or psychologists to aid in the preparation and disposition of the case; and
11. Any other issues that are appropriate.

J 5.8 Trial Motions

Counsel should be aware that certain motions are generally reserved for the trial judge, e.g., motions *in limine* and motions to sequester.

J 5.9 Motion Hearings

When a dispute on a motion requires a hearing, counsel's preparation should include:

1. investigation and discovery necessary to advance the claim, including visits to any scenes relevant to the subject matter of the motion;
2. careful research of appropriate case law which supports or expands rights guaranteed by the federal and state constitutions and/or the Massachusetts Rules of Criminal Procedure;
3. subpoenas for pertinent evidence and witnesses;
4. full understanding of the burdens of proof and evidentiary rules;
5. careful consideration of the benefits/costs of having the client testify;
6. careful preparation of any witnesses who are called, especially the defendant;
7. submission of a memorandum of law. (In some cases, a memorandum is required; in most cases it is advisable.) Proposed findings of fact and law are often advisable, as well.

J 5.10 Discovery Compliance

Once counsel's discovery motions are allowed, if appropriate, counsel should seek prompt compliance and/or sanctions for failure to comply. G.L. c. 119, § 55A, provides that Commonwealth's discovery responses be in writing upon motion of the juvenile or the court's own motion.

J 5.11 Interlocutory Relief

Where appropriate, counsel should consider seeking interlocutory relief, under the applicable Rule or statute, after an adverse pretrial ruling. The conduct of interlocutory hearings, including the submission of briefs and oral argument, is ordinarily the responsibility of trial counsel, whether the hearing was initiated by counsel or by the prosecution. Trial counsel handling an interlocutory appeal should contact the CPCS Director of Criminal Appeals-Private Counsel Division to determine whether assistance by appellate counsel is warranted.

J 5.12 Sentencing

Counsel should begin gathering information relative to possible sentencing as soon as possible. This should include, but not be limited to, obtaining any and all relevant school records, background information, psychological evaluations, and the like. See [§ J 4.3, ¶¶ a – g](#), and [§ J 8.1, ¶¶ 1 – 15](#).

VI. DISPOSITIONS BY PLEA OR ADMISSION

J 6.1 Plea Negotiations

- a) After interviewing the client and developing a thorough knowledge of the law and facts of the case, the attorney should explore all alternatives to trial, including the possible resolution of the case through a negotiated plea or admission to sufficient facts.
- b) Counsel should inform the client of any plea negotiations before they occur unless it is impractical to do so, in which case counsel should inform the client of the negotiations as soon after they occur as is possible.
- c) Counsel is responsible for fully explaining to the juvenile the concept of plea bargaining in general, as well as the details of any specific plea offer made to him/her. Counsel must use language appropriate to the client's age and mental capabilities.
- d) The attorney shall make it clear to the client that the ultimate decision to offer a change of plea or admit to sufficient facts has to be made by the client. Counsel should investigate and candidly explain to the client the prospective strengths and weaknesses of the case for the prosecution and defense, including the availability of prosecution witnesses, concessions and benefits which are subject to negotiation, and the possible consequences of a conviction after trial. Counsel's recommendation on the advisability of a plea or admission should be based on a review of the complete circumstances of the case and the client's situation. Such advice should not be based solely on the client's acknowledgement of guilt or solely on a favorable disposition offer.
- e) Where negotiations are begun, counsel should attempt to obtain the most favorable disposition possible for the client. The client shall be kept informed of the status of the plea negotiations.

J 6.2 Client Decisions

- a) Where an attorney believes that the client's desires are not in the client's best interest, the attorney may attempt to persuade the client to change his/her position. If the client remains unpersuaded, however, the attorney should assure the client he/she will defend the client vigorously.
- b) Counsel must not attempt to unduly influence or coerce the accused into pleading guilty or admitting to sufficient facts by any means, including, but not limited to, overstating the likelihood of conviction or potential consequences, or by threatening to withdraw from representing the accused if he/she decides not to accept the proposed agreement and to proceed to trial. It may be appropriate in rare cases to write a letter to the client outlining counsel's advice and the basis therefore.
- c) Notwithstanding the existence of ongoing tentative plea negotiations with the prosecution, counsel should continue to prepare and investigate the case in the same manner as if it were going to proceed to trial on the merits.

J 6.3 Preparation

- a) When a client decides to offer a change of plea, or admit to sufficient facts, counsel must fully explain to the client all aspects of the plea agreement, if any, including sentencing recommendations, using language appropriate to the client's age and mental capabilities. Counsel must carefully prepare the client to participate in the procedures required under Mass. R. Crim. P. 12 and used in the particular court. Counsel shall also ascertain and advise the client of the court's practices concerning sentence recommendations and withdrawing pleas or admissions.

- b) In advising a juvenile defendant regarding the consequences of a plea agreement, counsel must fully explain to the client, using language appropriate to the client's age and mental capabilities, DYS placement policies including: the classification grid, "staffing", classification, secure treatment, residential treatment, tracking, Grant of Conditional Liberty (GCL), and revocation of GCL.
- c) Before advising the prosecution and court that the client is willing to offer a change of plea or an admission to sufficient facts, counsel must also be satisfied that the plea is voluntary, that the client understands the nature of the charges, that there is a factual basis for the plea or the admission, that the witnesses are or will be available, and that the client understands the rights being waived including: a trial with or without a jury where the Commonwealth has the burden of proving guilt beyond a reasonable doubt, the right to confront witnesses, and the privilege against self-incrimination.
- d) Counsel should negotiate the statement of facts with the prosecutor, advocating for language most favorable to the client. Counsel must also fully review the statement of facts with the client, and prepare him/her for the specific language to be used in court.

J 6.4 Consequences of Conviction

Counsel must also fully advise the client of the consequences of a conviction, including:

1. the maximum possible sentence of all offenses;
2. mandatory minimum sentences where applicable;
3. effects of adult sentences on juvenile defendants;
4. different or additional punishments where applicable, such as for second offenses, probation violation or parole revocation consequences;
5. potential liability for enhanced punishment after subsequent arrest, i.e., adult habitual offender, armed career criminal, second and subsequent offenses;
6. possible Federal charges or penalty enhancements;
7. conviction consequences for non-citizens (G.L. c. 278, § 29D);
8. Sex Offender Registration Act (G.L. c. 6, §§ 178C, et seq.) and DNA Seizure and Dissemination Act (G.L. c. 22E) requirements. As to the Sex Offender Registry Act, counsel should be aware that if delinquency or youthful offender adjudication does not result in confinement, under G.L. c. 6, § 178E, paragraphs e-f, you are entitled to a judicial determination that the juvenile does not pose a risk of re-offending and therefore is relieved from registering. Upon written motion by the Commonwealth, a judge may relieve a juvenile from registering, even if sentenced to confinement;
9. parole eligibility (including the discretionary nature of parole decisions and that being eligible for parole does not confer a right to parole);
10. potential civil liabilities;

11. potential housing consequences for the defendant and his/her family;
12. potential loss or suspension of driving license;
13. potential school suspension or expulsion consequences (G.L. c. 71, §§ 37H and 37H1/2);
14. potential eligibility for youthful offender indictment in future cases;
15. potential risk of the Commonwealth seeking civil detention pursuant to the SDP (sexually dangerous persons) law (G.L. c. 123A);
16. potential risk of life time community parole;
17. potential adverse consequences on the client's employment or education; and
18. possible immigration consequences including but not limited to deportation, denial of naturalization or refusal of reentry into the United States.

J 6.5 Necessity of Admission of Guilt

Where the proceeding is a final adjudication, counsel should not advise the client to plead guilty unless the client either admits guilt to counsel, admits guilt to the court in a colloquy, only admits to sufficient facts, or tenders an Alford plea. During and after the change of plea colloquy, counsel must vigorously enforce all aspects of a plea agreement. Where a change of plea is contingent upon a specific agreement, counsel must be sure that the court is so informed before the tender of the plea, and that the agreement is duly recorded.

J 6.6 Disposition Argument

Notwithstanding a disposition by plea or an admission to sufficient facts, counsel must be prepared for sentencing arguments, including, where appropriate, argument for release pending sentencing or appeal.

VII. TRIAL PROCEEDINGS

J 7.1 General Trial Preparation

- a) Counsel should consider all steps necessary to complete investigation, discovery, and research in advance of trial, such that counsel is confident that the most viable defense theory has been fully developed, pursued, and refined. This preparation should include consideration of:
 1. summoning all potentially helpful witnesses, utilizing *ex parte* procedures if advisable (Mass. R. Crim. P. 17);
 2. summoning all potentially helpful physical or documentary evidence;
 3. arranging for defense experts to consult and/or testify on any evidentiary issues that are potentially helpful; e.g., testing of physical evidence, opinion testimony, etc.;
 4. obtaining and reading transcripts and other records of prior proceedings in the case or related proceedings;

5. obtaining photographs or preparing charts, maps, diagrams or other visual aids of all scenes, persons, objects, or information which may aid the fact finder in understanding the defense case and preparing to secure the admission of such evidence through witnesses who will testify at trial.
- b) Where appropriate, counsel should have the following materials organized and accessible at the time of trial:
1. copies of all relevant documents in the case;
 2. relevant documents prepared by investigators;
 3. proposed *voir dire* questions;
 4. motions *in limine*;
 5. outline of opening statement;
 6. cross-examination plans for all possible prosecution witnesses;
 7. motion for required finding of not guilty, renewed motion for required finding of not guilty, and outline of argument for required findings of not guilty and authorities supporting it;
 8. direct examination plans for all prospective defense witnesses;
 9. copies of defense subpoenas;
 10. prior statements of all prosecution witnesses (e.g., Grand Jury minutes transcripts, police reports);
 11. prior statements of all defense witnesses;
 12. reports from defense experts;
 13. a list of all defense exhibits, and the witnesses through whom each will be introduced;
 14. proposed jury instructions with supporting case citations;
 15. copies of all relevant statutes and cases, including statutes and cases relating to any potential lesser-included offenses; and
 16. outline or draft of closing argument.
- c) Counsel should be fully informed of the rules of evidence, and the law relating to all stages of the trial process, and should prepare for all legal and evidentiary issues that can be anticipated in the trial.
- d) If it is beneficial, counsel should seek an advance ruling on issues likely to arise at trial (e.g., use of prior convictions to impeach the defendant, prior or subsequent bad acts, reputation testimony, excited utterances, prejudicial evidence) and, where appropriate, counsel should prepare motions *in limine* and memoranda for such advance rulings.

- e) Counsel should be alert to and understand the importance of establishing, for appellate purposes, a complete record of the trial proceedings, and to be fully informed of the applicable law and practice regarding:
 - 1. preservation of each type of objection at every stage of the proceedings;
 - 2. offers of proof regarding evidence ruled inadmissible;
 - 3. recording of trial proceedings. Counsel should be aware that tape recordings of district court proceedings often prove to be inaudible or unreliable. Accordingly, counsel should make every attempt to obtain a stenographer, rather than rely only on a tape recording. G.L. c. 261, § 27(c); G.L. c. 218, § 27A.

J 7.2 Sequestration

Unless tactically inadvisable, counsel shall seek sequestration of all witnesses (including police, if possible) for trial (Mass. R. Crim. P. 21).

J 7.3 Bench Trial or Jury Trial

- a) The decision to proceed to trial with or without a jury rests solely with the client after complete advice of counsel. See Section V., Dispositions by Plea or Admission; Section I., General Principles of Representation.
- b) Counsel should fully advise the client of the advantages and disadvantages of either a jury or jury-waived trial. Counsel should be knowledgeable about and advise the client of the practices of the judge before whom the case may be tried. Counsel should exercise great caution before advising a jury waiver, especially without thorough discovery, including knowledge of the likely availability of prosecution witnesses, and their likely responses to cross-examination.

J 7.4 Voir Dire and Jury Selection

- a) Preparation
 - 1. Counsel should be familiar with the law governing the selection of the jury venire. Counsel should also be alert to any potential legal challenges to the composition or selection of the venire.
 - 2. Counsel should be familiar with the local practices and the individual trial judge's procedures for selecting a jury, including Superior Court Rule 6, and should be alert to any potential legal challenges to those procedures.
 - 3. Prior to jury selection, counsel should seek access to the juror questionnaires that have been completed by potential jurors.
 - 4. Counsel should develop and file in advance of trial written *voir dire* questions tailored to the particular case.
 - 5. Counsel should be familiar with the law concerning *voir dire* inquiries so as to be able to defend any request for particular questions.
 - 6. Counsel should consider asking for extra peremptory challenges.

7. Counsel should consider requesting appropriate *voir dire* questions regarding the prospective jurors' attitude regarding the juvenile's age and credibility, as well as attitudes toward juvenile crime and whether the Juvenile Court is lenient with juvenile cases.
8. Counsel should be familiar with varied practices in this area (e.g., use of juror questionnaires and attorney-conducted *voir dire*) and should attempt to employ these where appropriate.

b) Examining the Prospective Jurors

1. Counsel should be familiar with case law that requires individual *voir dire* in certain cases, e.g., inter-racial murder or other inter-racial cases, or sexual assault cases, sexual assault on children, "insanity" defenses.
2. Where appropriate, counsel should consider seeking permission to personally *voir dire* the panel, or at the very minimum, if the court poses questions, to ask follow-up questions.
3. When appropriate, counsel should consider requesting individual juror *voir dire* even when case law does not require it, particularly if the proposed *voir dire* questions may elicit sensitive information or expose prejudices. Counsel should be familiar with case law supporting such requests.
4. Counsel should be familiar with case law regarding the client's right to be present during individual *voir dire*. Counsel should fully discuss the risks and benefits of asserting this right with the client.

c) Challenges

1. Counsel should challenge for cause all persons about whom a legitimate argument can be made for prejudice or bias.
2. When challenges for cause are not granted, counsel should consider exercising peremptory challenges to eliminate such jurors, and where appropriate, ask for additional challenges.
3. In exercising challenges for cause or peremptory strikes, counsel should consider both the panelists who may replace a person who is removed and the total number of peremptory challenges available.
4. Counsel should make every effort to consult with the client in exercising challenges.
5. Counsel should be alert to prosecutorial misuse of peremptory challenges and should seek appropriate remedial measures.
6. Counsel should be aware that the number of challenges in a juvenile case is governed by Mass.R.Crim.P. 20(c)(1) and G.L. c. 119, § 56(e).

J 7.5 Opening Statement

- a) Counsel should consider the strategic advantages and disadvantages of making an opening statement, of disclosing particular information during the opening, and of deferring the opening statement until the beginning of the defense case. Except in extraordinary circumstances, counsel should make an opening statement.
- b) Counsel should be familiar with the law governing opening statements, particularly in a case where counsel does not plan to present any affirmative evidence. In addition, counsel should attempt to be familiar with individual trial judges' practices regarding the permissible content of opening statements.
- c) Counsel's objectives in making an opening statement may include the following:
 - 1. to provide an overview of the theory of the defense case;
 - 2. to summarize the testimony of witnesses and the role of each in relationship to the entire case;
 - 3. to describe the exhibits which will be introduced and the role of each in relationship to the entire case;
 - 4. to identify the weaknesses of the prosecution's case;
 - 5. to remind the jury of the prosecution's burden of proof;
 - 6. to clarify the jurors' responsibilities; and
 - 7. to personalize/humanize the client and counsel to the jury.
- d) Counsel should consider incorporating in the defense summation the promises of proof the prosecutor makes to the jury during his/her opening statement.
- e) Counsel should be prepared to object to the prosecutor's opening statement if it is improper and to seek curative instructions or a mistrial.
- f) Counsel should record, and consider incorporating in the defense summation, promises of proof the prosecutor makes to the jury during his/her opening statement.

J 7.6 Confronting the Prosecution's Case

- a) Counsel should research and be fully familiar with all of the elements of each charged offense and should anticipate weaknesses in the prosecution's case.
- b) Counsel should systematically analyze all potential prosecution evidence, including physical evidence, for evidentiary problems.
- c) In preparing for cross-examination, counsel should make an effort to be familiar with the applicable law, procedures and techniques concerning cross-examination and impeachment of witnesses.
- d) In preparing for and carrying out cross-examination, counsel should also:

1. develop a coherent and sensible theory of the case, along with the framework of the closing argument;
 2. anticipate those witnesses the prosecution might call in its case-in-chief or in rebuttal;
 3. integrate cross-examination, the theory of the defense and closing argument;
 4. consider whether cross-examination of each witness is necessary or likely to generate helpful information;
 5. review and organize all prior statements and testimony of each witness;
 6. be alert to inconsistencies and variations within each witness's testimony or contradictions (including material omissions) in prior statements by the witness;
 7. be alert to significant omissions or deficiencies in the testimony of any witness, e.g., investigative steps not taken, persons not interviewed by the police, failure to mention obvious physical characteristics;
 8. consider using certified copies of prior convictions or pending cases of witnesses, keeping in mind that juvenile adjudications may be used in the same manner as adult convictions;
 9. be alert to all issues relating to witness competency or credibility, including bias or motive for testifying;
 10. be alert to potential 5th Amendment issues that apply to any witness;
 11. elicit all facts to build and support the theory of defense.
- e) If counsel is surprised by any statements or items which should have been provided in discovery, but were not, counsel should request adequate time to review these before commencing cross-examination and should consider seeking any possible sanctions.
 - f) Counsel should carefully consider the advantages and disadvantages before entering into stipulations concerning the prosecution's case.
 - g) Unless it is clearly frivolous, counsel should file a motion and move at the close of the prosecution's case and out of the presence of any jury for a required finding of not guilty on all charges and/or any aggravating element, where appropriate. For cases that have strong legal issues to support counsel's argument, counsel should research the applicable case law and prepare, in advance, a memorandum in support of his/her motion. Counsel should request, when necessary, that the court immediately rule on the motion, in order that counsel may make an informed decision about whether to present a defense case.

J 7.7 Presenting the Defense Case

- a) Counsel should develop, in consultation with the client, a sensible overall defense strategy. Counsel should consider and advise the client whether the client's interests are best served by not offering testimony or evidence, but by relying on the prosecution's failure to meet its burden of proof instead.

- b) Counsel should discuss with the client all of the considerations relevant to the client's decision whether to testify (including the likely areas of cross-examination and impeachment).
- c) Counsel should understand both the elements and tactical considerations of any affirmative defense, and should know whether the client bears a burden of persuasion or a burden of production.
- d) In preparing for presentation of a defense case, counsel should, where appropriate:
 - 1. consider all potential evidence which could corroborate the defense case, and the import of any evidence which is missing;
 - 2. after discussion with the client, make the decision whether to call any witnesses;
 - 3. develop a plan for direct examination of each potential defense witness;
 - 4. determine the implications that the order of witnesses may have on the defense case;
 - 5. consider the possible use and careful preparation of character witnesses, along with the risks of rebuttal and wide-ranging cross-examination;
 - 6. consider the need for expert witnesses, especially to rebut any expert opinions offered by the prosecution;
 - 7. consider the use of physical or demonstrative evidence and the witnesses necessary to admit it; and
 - 8. obtain the prior records of all defense witnesses.
- e) In developing and presenting the defense case, counsel should consider the implications it may have for a rebuttal by the prosecutor.
- f) Counsel should prepare all witnesses for all foreseeable direct and cross-examination. Counsel should also advise witnesses of suitable courtroom dress, demeanor and procedures, including sequestration.
- g) Counsel should systematically analyze all potential defense evidence for evidentiary problems. Counsel should research the law and prepare legal arguments in support of the admission of each piece of testimony or other evidence.
- h) Counsel should conduct a direct examination that follows the rules of evidence, effectively presents the defense theory, and anticipates/defuses potential weak points.
- i) If an objection is sustained, counsel should make appropriate efforts to re-phrase the question(s) and/or make an offer of proof.
- j) Counsel should guard against improper cross-examination by the prosecutor.
- k) Counsel should conduct re-direct examination as appropriate.
- l) At the close of the defense case, counsel should renew any previously filed motions for a required finding of not guilty on each charged count and/or aggravating element.

- m) Counsel should keep a record of all exhibits identified or admitted.

J 7.8 Closing Argument

- a) Before argument, counsel must file and should seek to obtain rulings on all requests for instructions (see Mass. R. Crim. P. 24(b) and 26) in order to tailor or restrict the argument properly in compliance with the Court's rulings.
- b) Counsel should be familiar with the law and the individual judge's practice concerning time limits, objections and substance of closing arguments.
- c) In developing closing argument, counsel should review the proceedings to determine what aspects can be used and persuasively argued in pursuit of the defense theory of the case. Counsel should consider:
 - 1. highlighting weaknesses in the prosecution's case, including what potential corroborative evidence is missing, especially in light of the prosecution's burden of proof;
 - 2. favorable inferences to be drawn from the evidence;
 - 3. incorporating into the argument:
 - (a) helpful testimony from direct and cross-examinations;
 - (b) verbatim instructions drawn from the expected jury charge; and
 - (c) responses to anticipated prosecution arguments.
 - 4. the effects of the defense argument on the prosecutor's possible rebuttal argument.
- d) Whenever the prosecutor exceeds the scope of permissible argument, counsel should consider objecting (either immediately or at conclusion of argument), requesting a mistrial, or seeking cautionary instructions. Counsel should weigh strategic considerations in deciding whether to object during or after the prosecutor's closing argument.
- e) Counsel should avoid a closing which restates the Commonwealth's case. Counsel should consider incorporating in his/her summation the promises of proof the prosecutor made to the jury during his/her opening.

J 7.9 Jury Instructions

- a) Counsel must file proposed or requested jury instructions before closing argument.
- b) Counsel should be familiar with the law and the individual judge's practices concerning ruling on proposed instructions, charging the jury, use of standard charges and preserving objections to the instructions.
- c) Counsel should submit both standard and modified jury instructions tailored to the particular circumstances of the case and should provide case law in support of the proposed instructions.
- d) Where appropriate, counsel should object and argue against instructions proposed by the prosecution.

- e) If the court refuses to adopt instructions requested by counsel, or gives instructions over counsel's objection, counsel should take all steps necessary to preserve the record, including, where appropriate, filing a copy of the proposed instructions or reading the proposed instructions into the record.
- f) During delivery of the charge, counsel should be alert to any deviations from the judge's planned instructions. After the charge, counsel should object on a timely basis to deviations and any other instructions unfavorable to the client, and, if necessary, request additional or curative instructions.
- g) If the court proposes giving supplemental instructions to the jury, either upon request of the jurors or upon their failure to reach a verdict, counsel should request that the judge give counsel a meaningful opportunity to be heard (outside the jury's presence) on the supplemental instruction before it is delivered.

J 7.10 Taking Verdicts

Counsel should be alert to any improprieties in the verdict and consider requesting that the jury be polled.

VIII. SENTENCING

J 8.1 Preparation

Defense counsel should be familiar with and consider:

1. the statutory penalties for each possible adjudication/conviction of the client, including each lesser-included offense and any repeat offender penalties. In particular counsel should be familiar with the sentencing provisions of G.L. c. 119 which distinguish between delinquency, youthful offender, and criminal adjudications;
2. the official version of the client's prior record, if any;
3. the position of the probation department with respect to the client;
4. the sentencing recommendation and memorandum, if any, of the prosecutor;
5. seeking the assistance of an expert -- either through community resources, G.L. c. 261, §§ 27A-G, or the Committee for Public Counsel Services;
6. the collateral consequences attaching to any possible sentence, e.g., parole or probation revocation, immigration consequences, later exposure to prosecution as a repeat offender, possibility of sexually dangerous person proceedings, loss of license, Sex Offender Registration, DNA Seizure and Dissemination, school suspension or expulsion, expulsion from public housing, lifetime community parole, or civil forfeiture of property;
7. the sentencing practices of the judge, to the extent they may be determined;
8. the sentencing guidelines, as they would apply to the case;

9. referrals to court clinics or other community agencies, and the possibility of commitment to a mental hospital for an evaluation in aid to sentencing under G.L. c. 123, § 15(e);
10. any victim impact statement to be presented to the court;
11. any other report to be presented to the court in aid of sentencing;
12. seeking an evidentiary hearing; e.g., restitution amount;
13. requesting a continuance for sentencing at a later date;
14. any other information or proposals that may be helpful to the client; and
15. the DYS classification grid.

J 8.2 Prosecution and Probation Recommendations

Counsel should advocate in advance of trial or sentencing for a favorable recommendation from both the prosecutor and the representative of the probation department.

J 8.3 Pre-Sentence Reports

- a) Counsel should be familiar with the practices of the court and its probation department relative to pre-sentencing reports. Counsel should consider requesting one where, after consultation with the client, s/he has good reason to believe that it would be helpful.
- b) Counsel shall determine the accuracy and completeness of all sentencing reports and statements and should be prepared to challenge any incorrect information or omissions and take steps to correct inaccuracies before prejudice occurs.
- c) Counsel should carefully prepare the client for, and attempt to attend, any pre-sentence interview to be conducted in aid of sentencing. Counsel should advise about the client's Fifth Amendment rights, if appropriate.
- d) Counsel should be aware that any juvenile sentenced as a youthful offender is entitled to have a pre-sentence investigation and report.

J 8.4 Defense Recommendations

- a) Counsel should carefully consider and discuss with the client any sentencing recommendations to be made by the defense and the reasons for them. If appropriate, counsel should discuss any recommendations with other experienced defense counsel. Counsel should explore all reasonable alternatives to commitment to DYS or incarceration as an adult, e.g., community services, educational services, rehabilitative programs, DSS services, including shelter care, foster placement, or residential placement, DMH or DMR services, outpatient counseling, inpatient drug treatment, and restitution.
- b) Where tactically advisable or requested by the court, counsel should prepare a sentencing memorandum, presenting every factual and legal ground that will assist in reaching the most favorable disposition obtainable.

- c) At sentencing, counsel should zealously advocate the best possible disposition, including a request for continuance without a finding, especially if the client has no record. Note that G.L. c. 119, § 58 permits a CWOFF even after trial for most charges. Counsel should take whatever steps are necessary, including, where appropriate, the presentation of documentary evidence and witnesses, e.g., reports or testimony from employers, community representatives, therapists/counselors, and family.
- d) Where appropriate, counsel should carefully prepare the client or a close relative to address the court.

J 8.5 Dispositions

- a) Counsel should be alert to, and challenge by hearing if necessary, any inappropriate conditions of probation, including the amount of restitution.
- b) Counsel should request a reasonable time period for the payment of any fines or restitution. If appropriate, counsel should request that a hearing be held to determine the amount of restitution and should represent the client at that hearing.
- c) Counsel should fully explain to the client, using language appropriate to the client's age and mental capabilities, the foreseeable consequences of the sentence, including any conditions of probation and the consequences of violating probation.
- d) Counsel should fully explain to the client, using language appropriate to the client's age and mental capabilities, the DYS Classification Grid, as well as the possibility of extension of DYS commitment (G.L. c. 120, §§ 17-20). (Unless inappropriate, counsel should also advise the parent of these factors.)
- e) Counsel should insure that the sentence accurately reflects the rights of the client for parole eligibility and jail credit.
- f) Counsel should consider requesting specific orders or recommendations from the court, including, but not limited to, the place or conditions of confinement, parole eligibility, psychiatric treatment or drug rehabilitation, and recommendations against deportation.
- g) If a DYS commitment results at disposition, it is highly recommended that counsel attend the case conference (also known as "staffing") which takes place after an initial evaluation period of approximately three weeks. When attendance is not feasible, the attorney may call or write the assigned caseworker with recommendations.
- h) Counsel should be familiar with the statutes and case law concerning jail credit. Counsel should ensure that the mittimus accurately reflects any jail credit to which the client is legally entitled. Trial counsel should be available to correct an error in the mittimus discovered at a later date.

IX. POST-TRIAL PROCEEDINGS

(See CPCS Standards for Appellate Representation.)

J 9.1 Appellate Rights

- a) Counsel should advise the client after sentencing about the right to file a motion to revise and revoke the sentence. Counsel should explain the value of filing the motion to enable the court to fashion an equitable disposition in future proceedings. Counsel should file such motion in a timely fashion,

pursuant to Mass. R. Crim. P. 29, if requested to do so by the client or, if appropriate to protect the client's interests.

- b) After advising the client of the right to appeal, trial counsel should implement the client's decision in that regard. If an appeal is taken, trial counsel should timely file the appropriate notice of appeal and request either a tape or transcript of the prior court proceeding.
- c) Where there is an appeal, counsel should consider requesting a stay of execution of any sentence, particularly one of incarceration. If the stay is denied, counsel should consider appealing the denial of the stay to a single justice of either the Appeals Court or the Supreme Judicial Court.
- d) If a state prison sentence has been imposed, counsel should consider filing a sentencing appeal. Counsel should represent the client at the sentencing appeal.

J 9.2 Continuing Duty to Represent

- a) Trial counsel should file a Motion to Withdraw and a Motion for Appointment of Substitute Counsel on Appeal so that appellate counsel will be appointed. Trial counsel should assure that these motions are acted upon by the court.
- b) Counsel retains responsibility for the case until and unless another attorney assumes that responsibility. Trial counsel should fully cooperate with successor counsel including prompt provision of the trial file that includes all work product. Upon request of the client, trial counsel will provide a copy of said trial file.